Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

October Term, 1999

Howard Altschuler

Petitioner,

versus

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL; TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA; and the University of Pennsylvania; ELIZABETH SLUSSER KELLY, as Professor of Law and Director of the University of Pennsylvania Law School Legal Writing Program and individually; COLIN DIVER, as Dean of the University of Pennsylvania Law School and individually; JUDITH RODIN, Dr. as President of the University of Pennsylvania and individually; JOHN DOES, in their capacities as employees and/or agents of the University of Pennsylvania and individually; BRACH, EICHLER, ROSENBERG, SILVER, BERNSTEIN, HAMMER & GLADSTONE P.C.; JANE DOES in their capacities as employees and/or agents of Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. and individually.

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED FOR REVIEW

I. Whether the Second Circuit's decision below conflicts with other circuit courts as to the proper application of *Kumho Tire Co. v. Carmichael* and *General Elec. Co. v. Joiner*, by affirming the trial court's *sua sponte* preclusion of non-scienticifc expert testimony, based on nothing more than the district court's unexplained comment that the expert report was "junk."

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit in *Altschuler v. University of Pennsylvania, et al.*, is unpublished and was entered on December 27, 1999. *See App. A.*

The Court of Appeals denied a timely petition for rehearing on February 8, 2000. *See App. B.*

The district court's oral ruling precluding an expert report and expert testimony was made on February 19, 1999. *App. C.*

The opinions of the United States District Court for the Southern District of New York dismissing claims not subject to this writ, are reported at 1998 U.S. Dist. Lexis 3046 (S.D.N.Y.) and 1997 U.S. Dist. Lexis 3248 (S.D.N.Y.).

BASIS FOR JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1). This petition is filed within ninety days of the Second Circuit's denial for rehearing on February 8, 2000, and is therefore timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fed. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

United States Constitution, Fifth Amendment, provides in relevant part:

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In January 1994, a hiring partner of defendant Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone P.C. ("Brach-Eichler"), told a junior partner that a recent law school graduate, Howard Altschuler ("Petitioner" or "Altschuler"), should not be hired because Altschuler was involved in a disciplinary incident while a first-year law student at the University of Pennsylvania.

Disciplinary incidents at the University of Pennsylvania Law School involve egregious conduct such as plagiarism, cheating, mutilating library materials for competitive advantage, acts of violence, fraud and dishonesty, sexual or racial harassment or criminal behavior.

As a direct result of the hiring partner's statement that Altschuler had been involved in a disciplinary incident, Brach-Eichler withdrew a tentative job offer made to Altschuler.

Altschuler, who had been class president of his law school class and an active member of student government, was never involved in any disciplinary incident. In January 1995, he filed suit against defendant Brach-Eichler for defamation, and against the University of Pennsylvania for issues not contested in this petition.

A two-day jury trial on the Brach-Eichler case was held on February 21-22, 1999. Altschuler settled the claims against the University of Pennsylvania just before trial.

Under New Jersey law, Altschuler had the burden to establish, by clear and convincing evidence, that the Brach-Eichler hiring partner abused a conditional privilege. *See Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 806 (N.J. 1990).

To establish clear and convincing evidence that Brach-Eichler abused its privilege, Altschuler submitted to the trial judge an expert report on standard practices for checking credentials and references, issues of dispositve importance to the case.

At a pre-trial conference on February 19, 1999, three days before the commencement of the jury trial, the district court *sua sponte* precluded the use of the petitioner's expert. Pursuant to the district court's standing rules, the expert report was timely submitted on February 17, 1999. In their trial brief, submitted on February 19, 1999, the Brach-Eichler defendants did not raise any objection to the expert's credentials or his report. The Court did not hold a hearing on the matter.

Altschuler's expert was an expert in hiring practices. He had over twenty years experience in the field. As the former Director of Human Resources for a Fortune 100 company, the expert had been responsible for human resource programs and services for 5000 employees nationwide, and managing a staff of forty employees. The court did not question his credentials as an expert (as it did for the expert proposed by the defendants), only his work product and proposed testimony. The district court stated:

> "I think [the report] is junk, and under *Daubert* I don't think I can let it in or would let it in. . . . I've read it and it's really one of the easiest calls on expert testimony that I've been asked to make. So I think you ought to figure on going ahead without him unless you can persuade me to change that."

In response, Altschuler asked what specific objections the court had. *App. at 11a.* The judge provided no specifics, or any legal explanation for its preclusion under *Daubert*, but stated only: "In most expert's [sic] reports there is something salvageable. In his I found nothing." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In contrast, the court went through the defendant's brief expert report line by line before precluding it. *App. 13a-15a.*

With no expert to establish abuse of privilege by clear and convincing evidence, the court dismissed Altschuler's case on defendants' motion at the conclusion of petitioner's presentation of evidence to the jury. The Second Circuit affirmed the trial court's *sua sponte* preclusion of the expert report and his testimony. *App. at 6a.* However, this affirmation leaves disagreement between circuits as to the threshold requirements for "gate-keeping" for nonscientific reports.

REASONS FOR GRANTING THE WRIT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW ADDS TO THE CONFLICT AMONG THE CIRCUIT COURTS AS TO THE PROPER APPLICATION OF *KUMHO TIRE* AND *JOINER*

The *Altschuler* court has added to an already intolerable conflict among the nation's courts of appeal regarding the scope of the federal constitutional guarantees embodied in the Fifth Amendment. It affirmed the district court's *sua sponte* exclusion of expert testimony without any hearing or findings of fact or law, other than an

unexplained declaration by the district court that the report was "junk" and that nothing in it could be salvaged.

This decision conflicts with other circuits recognizing that while a district court is afforded discretion in its rulings on experts, that discretion is not unlimited. *See infra.*

It is also at odds with Justice Scalia's concurring opinion in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), that trial judges have "discretion in choosing the manner of testing expert reliability" but "not discretion to abandon the gatekeeping function." *Id.* at 158-59. Justice Scalia also stated that district judges have discretion to choose only "among reasonable means of excluding expertise that is fausse and science that is junky" and that, while the four *Daubert* criteria do not necessarily apply to every situation, "in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion." *Id.*

Kumho Tire was decided a month after the district court dismissed Altschuler's case. In *Kumho Tire*, unlike the instant case, the district court gave a detailed analysis of the expert's report, and discussed factual objections to the report in light of the requirements of *Daubert*.

Moreover, beyond the conflict among courts, the *Altschuler* decision demonstrates that the court below has fundamentally misconstrued the constitutional principles of due process, and in so doing, has advanced an analysis that confounds this Court's Fifth Amendment jurisprudence. *See infra.*

The *Altschuler* decision has implications far beyond the petitioner's interests in this case. The Second Circuit violated the petitioners rights to a fair trial by giving the district court unlimited discretion to preclude expert testimony with no more than a declaration that the expert

report was "junk," and without providing the petitioner any reason or ground for the preclusion. This hurts all litigants in the minority of circuits that effectively give trial courts absolute discretion to preclude expert testimony. A litigant in those circuits cannot determine how to avoid preclusive deficiencies for non-scientific expert testimony, or have any grounds on which to appeal, since the trial court need not specify the reasons for its preclusion. *See* Marilee M. Kapsa & Carl B. Meyer, *Scientific Experts: Making Their Testimony More Reliable*, 35 Cal. W. L. Rev. 313, 331 (1999) (complaining that the "lack of an objective standard" makes admissibility determinations unpredictable); James E. Starrs, *There's Something About Novel Scientific Evidence*, 28 Sw. U. L. Rev. 417, 437-38 (1999) (stating that, by extending *Daubert's* principles to all expert testimony, *Kumho* created "the potential for considerable chaos in federal trial courts").

Among other things, petitioner's expert would have testified that Brach-Eichler's hiring procedures were reckless and fell far outside the normal standard of care, and therefore added clear and convincing evidence that the firm abused any conditional privilege.

Such expert testimony was particularly important to establish abuse by clear and convincing evidence because the defendants claimed they had received negative information about Altschuler from a third-party. The only evidence of that was contradictory testimony of the hiring partner, who could not remember the name of the third party, the law firm for which this third-party allegedly worked, or even the precise content of the third-party's alleged comments.

Although the hiring partner testified he made a phone call to the third-party's Connecticut law firm as part of the partner's legal work for another case, the defendants could not produce phone records or time logs to establish a phone call had actually taken place. The Court of Appeals

based its affirmation on the clearly erroneous factual conclusion that the partner had actually received information from a third-party and therefore did not abuse a conditional privilege as a matter of law. *App. at 5a.*

The expert would have testified as to acceptable practices under the circumstances of the case below. This would have undermined the hiring partner's credibility as to how he processed what was vague information allegedly received from an anonymous source regarding the petitioner. Since defendants had no documentary evidence to establish such a conversation took place, the jury could have disbelieved the hiring partner's contradictory testimony and found that the hiring partner had no basis for making a statement and, therefore, knew for a fact his statement to a junior partner was false.

Expert testimony was also necessary to establish excessive publication, which would have eliminated the privilege altogether. Petitioner's expert opined that under standard practices and the circumstances of the case, it was excessive for the hiring partner to communicate unsubstantiated negative information about a job applicant to a junior partner who had no authority to hire. *See Feggans v. Billington*, 291 N.J. Super. 382, 399 (App. Div. 1996).

The prejudice to petitioner of the trial court's last minute preclusion of plaintiff's expert was exacerbated by the court's procedural rule requiring a party who will call an expert to submit that expert's direct testimony with the trial court as late as the submission date of the pre-trial order. *Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1089 (10th Cir. 1994)* (suggesting that as a "'gatekeeper', the district court [should] carefully and meticulously make an early pretrial evaluation of issues of admissibility").

In this case, the court scheduled the due date of the pretrial order for February 17, 1999 and a final pretrial

conference on February 19, a Friday afternoon. The court's *sua sponte* and unexplained preclusion of the expert late on Friday afternoon, made it impracticable for the plaintiff to have the expert revise or correct the report, even assuming the expert was available over the weekend, for a trial set to commence three days later on February 22, 1999. *Cf. Summers v. Missouri Pac. R.R. Sys., 132 F.3d 599, 605 (10th Cir. 1997)* (amending the scheduling order so that the plaintiff could locate new experts after the first experts were struck).

This Court noted in *Kumho Tire* that a trial court "must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." *Id.* at 152. Implicit in that analysis is the expectation that a ruling precluding an expert's report will be based on more than an unexplained ruling three days before the trial that an expert report is junk, particularly when the court itself set the schedule for submitting an expert report five days before the trial.

Justice Rehnquist expressed concern about how courts would apply *Daubert* when faced with expert testimony based on nonscientific knowledge. *Daubert*, 509 U.S. at 600. In *General Elec. Co. v. Joiner*, 118 S. Ct. 512 (1997), this Court held that *Joiner's* abuse of discretion standard applies not only to a trial court's determination of relevance and reliability, but also to a trial court's decision of how to make that determination. Yet, as noted, Justice Scalia, with Justice O'Connor and Justice Thomas concurring, made it clear that a court must engage in some analysis.

A district court abuses its discretion if its conclusion is guided by erroneous legal principles *Koon v. United States*, 518 U.S. 81, 100 (1996). There is also abuse if a

decision rests upon a clearly erroneous factual finding. *United States v. Barber*, 119 F.3d 276, 283(4th Cir.) (en banc), cert. denied, 118 S. Ct. 457 (1997). In the *Altschuler* case, the Second Circuit applied no legal principle and made clearly erroneous findings of fact. *See supra.*

Both before and after this Court's decision in *Kumho Tire*, commentators have remarked on the need for "guideposts" to direct judges in deciding questions of admissibility. *See, e.g.*, Daniel J. Capra, *The Daubert Puzzle*, 32 *Ga. L. Rev.* 699, 703, 714 (1998) (observing that the district judge in *Joiner* would not have abused his discretion either by admitting or by excluding the expert testimony at issue); K. Isaac DeVyver, *Opening the Door but Keeping the Lights Off: Kumho Tire Co. v. Carmichael and the Applicability of the Daubert Test to Nonscientific Evidence*, 50 *Case W. Res. L. Rev.* 177, 200-02 (1999) (asserting that Kumho "left judges without a consistent or dependable standard for determining the reliability of nonscientific expert testimony").

The Circuits use conflicting factors, in addition to or in place of the *Daubert* factors, to resolve the issue of whether a particular expert will be permitted to testify. Some make their decision based on the expert's experience and education, while others place more weight on the expert's credibility. The decision below makes it unclear to parties, attorneys and even judges what factors and criteria are necessary to use nonscientific expert testimony.

For example, the First and Tenth Circuits hold the view that district courts should conduct a preliminary assessment of the reliability of expert testimony, but need not make "specific on-the-record rulings concerning the admissibility of expert testimony." *Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277 (10th Cir. 2000), quoting *Hoult v. Hoult*, 57 F.3d 1, 4-5 (1st Cir. 1995). *See also Cortes-Irizarry v. Corporacion Insula De Seguros, 111 F.3d 184, 188 (1st Cir. 1997)* (cautioning that the proponent of the

expert evidence must be afforded "adequate opportunity to defend its admissibility).

On the other hand, the Third Circuit has noted the need for *in limine* hearings. *Padillas v. Stork-Gamco*, 186 F.3d 412 (3d Cir. 1999). In one Third Circuit case, a court scheduled most of one month and part of two other months for the preliminary assessment alone. *In re Paoli R.R. Yard PCB Litigation II*, 35 F.3d 717 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995).

The Seventh Circuit contends that a trial judge does not need to explicitly express the *Daubert* factors when assessing the reliability and validity of the expert's methodology, so long as the court's decision is based upon a *Daubert* analysis. *Ancho v. Pentek Corp., 157 F.3d 512, 517-18 (7th Cir. 1998).*

The Ninth Circuit is of the view that district courts are not required to hold such hearings. *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124 (9th Cir. 1994), cert. denied, 513 U.S. 1082 (1995). However, the *Hopkins* court also requires a party challenging scientific evidence to make a prima facie case showing that the expert failed to follow accepted scientific methodology or reasoning before it will proceed with any kind of Rule 104(a) hearing. *Id.* 1124. In the *Altschuler* case, the defendants did not contest the expert's credentials or report in their pre-trial brief. *See Hose v. Chicago N.W. Transp. Co., 70 F.3d 968, 973 n.3 (8th Cir. 1995)* (noting that a party should challenge reliability pretrial).

In *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 564 n.21 (11th Cir. 1998)*, the Eleventh Circuit noted that *Daubert* hearings, although not mandated by law nor procedural rules, are usually a beneficial use of the court's time.

CONCLUSION

This case presents questions of exceptional importance to the many litigants who use experts for non-scientific testimony.

An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("It seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.").

The district court provided no legal or factual analysis to support its last minute and *sua sponte* preclusion of petitioner's expert. A writ of certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit, which accepted the district court's unexplained view that the expert report was "junk."

The petitioner asks this Honorable Court to confirm that *Kumho Tire* and *Joiner* require that a trial court engage in some level of discretion in deciding whether to preclude expert testimony. Any other decision is an unconstitutional infringement of petitioner's right to a fair trial under the United States Constitution.

In the alternative, petitioner respectfully requests this court issue a summary reversal.

Respectfully submitted,
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APPENDIX A: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of December, one thousand nine hundred and ninety-nine.

Present: HONORABLE RALPH K. WINTER,

Chief Judge,

HONORABLE FRED I. PARKER,

HONORABLE SONIA SOTOMAYOR,

Circuit Judges.

HOWARD ALTSCHULER,

Plaintiff-Appellant,

v.

No. 99-7423

UNIVERSITY OF PENNSYLVANIA SCHOOL OF LAW, TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, UNIVERSITY OF PENNSYLVANIA, ELIZABETH SLUSSER KELLY, as Professor of Law and Director of the University of Pennsylvania School of Law Legal Writing Program and individually, COLIN DIVER, as Dean of the University of Pennsylvania School of Law and individually, JUDITH RODIN, Dr., as President of the University of

Pennsylvania and individually, JOHN DOES, in their capacities as employees and/or agents of the University of Pennsylvania and individually, BRACH, EICHLER, ROSENBERG, SILVER, BERNSTEIN, HAMMER & GLADSTONE P.C., JANE DOES, in their capacities as employees and/or agents of Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone P.C. and individually,

Defendants-Appellees.

- -

Appearing for Appellant: Howard A. Altschuler, pro se, Haworth, New Jersey.

Appearing for Appellees: Arthur M. Toback, Toback, Hyman & Bernstein, New York, New York, for Defendants-Appellees affiliated with the University of Pennsylvania.

Abbott S. Brown, Brown & Gold, South Orange, New Jersey, for Defendant-Appellee Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C.

Appeal from the United States District Court for the Southern District of New York (Stanton, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Howard Altschuler appeals from Judge Stanton's dismissal of his claims and from certain collateral evidentiary rulings. He argues that the district court erred in: (i) holding there was no evidence from which a reasonable jury could find that attorneys at Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. ("Brach Eichler") abused their conditional privilege to publish an allegedly defamatory statement about appellant; (ii) ruling that Brach Eichler's failure to deny a statement in a letter from appellant was not an adoptive admission that Brach Eichler knew the statement was false; (iii) precluding the testimony of an expert witness proffered by appellant; (iv) not sanctioning Brach Eichler by drawing an adverse inference from its destruction of certain telephone records and its failure to apprise appellant that one of Brach Eichler's partners had left the firm; (v) dismissing his breach of contract claims against the University of Pennsylvania School of Law; and (vi) dismissing his Section 1983 claim based on the Law School's alleged violation of the Family Educational Records and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. We affirm.

We review de novo a district court order granting judgment as a matter of law under Fed. R. Civ. P. 50(a) and will affirm such orders if no reasonable trier could return a verdict for the non-movant. See Norville v. Staten Island Univ. Hosp., --- F.3d ---, No. 98-9583, 1999 WL 996945, at *2 (2d Cir. Nov. 2, 1999).

The parties do not contest the district court's ruling that New Jersey law applies to appellant's defamation claim. Appellant also does not dispute that Brach Eichler's intra-firm publication of the allegedly defamatory statement -- that appellant had been subject to discipline while at the Law School -- is protected by a conditional privilege. Appellant argues, however, that the district

court erred in ruling that, as a matter of law, Brach Eichler did not abuse that privilege. Under New Jersey law, the conditional privilege is abused when, inter alia, the holder of the privilege publishes a defamatory statement in an excessive manner or makes it with either actual knowledge of, or reckless disregard for, its falsity. *See Bainhauer v. Manoukian,* 520 A.2d 1154, 1172-73 (N.J. Super. Ct. App. Div. 1987). To overcome a conditional privilege defense to a defamation claim, a plaintiff must show abuse of the privilege by clear and convincing evidence. *See Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 806 (N.J. 1990).

Having carefully reviewed the record, we hold that there is no evidence from which a reasonable jury could conclude by any standard of proof that Brach Eichler abused its conditional privilege. No duty existed requiring any Brach Eichler attorney to investigate further the information it received and published internally. And, there was no evidence that any Brach Eichler attorney either knew or recklessly disregarded that the statement at issue was false. And that Brach Eichler may have published it to two partners who interviewed appellant but worked in a department of the firm with no hiring needs cannot support a finding of excessive publication by clear and convincing evidence. These partners clearly had the requisite common interest in appellant's qualifications to work at their firm so that publication of the statement to them was privileged. See *Coleman v. Newark Morning Ledger Co.*, 149 A.2d 193, 203 (N.J. 1959) ("A communication made [b]ona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable . . . .") (internal quotation marks omitted); Restatement (Second) of Torts

§ 596 cmt. c (1977) ("The [conditional privilege] rule is based on the fact that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them. This interest in their common affairs entitles him to information . . that affects the common interest[] even though he is not personally concerned . . . ."). Accordingly, we affirm the district court's order granting Brach Eichler judgment as a matter of law on appellant's defamation claim.

We also hold that the district court did not abuse its discretion in making certain evidentiary rulings relating to whether Brach Eichler was protected by the conditional privilege. Brach Eichler's failure to respond to appellant's letter denying that he was subject to discipline at the Law School does not evidence that Brach Eichler knew the alleged defamatory statement was false. In the circumstances, no employer would naturally have denied the truth of this statement by a jilted applicant; the firm's silence in the face of appellant's letter is therefore of no probative value. *See United States v. Hale,* 422 U.S. 171, 176 (1975) ("Failure to contest an assertion . . . is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question.").

The district court also properly exercised its gatekeeping authority in excluding the proffered expert -- a former director of personnel -- based on a finding that his report concerning hiring practices was "junk" and was therefore not reliable evidence of whether Brach Eichler recklessly disregarded the falsity of a third-party's statement that appellant was subject to discipline at the Law School. *See Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1171 (1999) (holding that district court has "broad latitude" to determine whether non-scientific expert testimony is sufficiently reliable to be admissible).

Finally, the district court properly declined to sanction Brach Eichler with an adverse inference due to the spoliation of certain evidence because there was no showing that Brach Eichler destroyed or suppressed relevant evidence in bad faith. *See Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (applying the "general rule" that adverse inference from spoliation must be predicated on bad faith of party alleged to have destroyed or suppressed evidence). The telephone records that appellant sought as evidence were destroyed before the firm had notice that this litigation was likely to be commenced. And Brach Eichler had no duty, absent a discovery request, to apprise appellant that the partner who told appellant he would not be hired had left the firm.

We also affirm the orders dismissing appellant's claims against the Law School. As to the breach of contract claims, we affirm for substantially the reasons stated by the district court. *See Altschuler v. University of Pennsylvania Law Sch.*, No. 95 Civ. 249, 1997 WL 129394, at *4-*7 (S.D.N.Y. Mar. 21, 1997).

As to appellant's Section 1983 claim, we affirm on the ground that the Law School, a private entity, is not a state actor subject to Section 1983 liability for failing to comply with FERPA. *See Leeds v. Meltz*, 85 F.3d 51, 54 (2d Cir. 1996); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937-38 (1982).

We therefore affirm.

APPENDIX B: ORDER, DENYING PANEL REHEARING

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court House, Foley Square, in the City of New York, on the 8th day of February, two-thousand.

Present:

Hon. Ralph K. Winter, chief judge

Hon. Fred I. Parker,

Hon. Sonia Sotomayor, Circuit Judges

A petition for panel rehearing having been filed herein by Howard Altschuler, upon consideration thereof, it is Ordered that said Petition be and it hereby is DENIED.

APPENDIX C: TRANSCRIPT OF DISTRICT COURT'S FEBRUARY 19, 1999 RULING PRECLUDING PETITIONER'S EXPERT WITNESS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HOWARD ALTSCHULER,

Plaintiff,

v. 95 Civ. 249(LLS)

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, et al.,

Defendants.

----------x

February 19, 1999 2:30 p.m.New York, N.Y.

Before: HON. LOUIS L. STANTON,

District Judge

* * *

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(In the robing room)

THE COURT: I think have read all the papers. I am sure you have each read each other's.

* * *

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* * *

THE COURT: I think there is a line of division between what might have been in Brach Eichler's own interest in conducting its hiring operations on the one hand and any duties that they owed you on the other hand. And those should not be confused. So I am puzzled about the admissibility of your or your expert's ideas about what Brach Eichler should have done in the conduct of their interviewing procedures. Perhaps that's misleading. I'm not really puzzled about it. I think it's inadmissible, but I am open to being persuaded the other way.

MR. ALTSCHULER: Which part? I'm not clear. Are

you talking about Mr. McNamara's testimony?

THE COURT: Mr. McNamara's testimony I am seriously considering striking in its entirety and leaving you to this expert report as to the proffer for the purposes

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of the Court of Appeals. I think it is junk, and under Daubert I don't think I can let it in or would let it in. Again, I'm open to being persuaded the other way, but that is my inclination. I've read it and it's really one of the easiest calls on expert testimony that I've been asked to make. So I think you ought to figure on going ahead without him unless you can persuade me to change that.

MR. ALTSCHULER: The defendants hadn't raised that issue so I haven't thought about it specifically.

THE COURT: They did not, but any trial judge would on reading his report.

MR. ALTSCHULER: Would it be OK if I had some time to do some research on that?

THE COURT: You have all weekend.

MR. ALTSCHULER: I can't really respond directly right now.

THE COURT: I say that for two reasons. One is I don't want you sandbagged later but to have all the notice.

I read it I think yesterday so I want to give you all the early notice I can so that you can, among other things, economize to the degree that's possible, and also because I want to give you an opportunity to persuade me I am wrong if you can. So that's OK, but I just wanted to give you early warning.

MR. ALTSCHULER: Was there anything specific in

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the report? It was my impression he was just talking about some general hiring practices.

THE COURT: In most expert's reports there is something salvageable. In his I found nothing.

MR. BROWN: Judge, may I state for the record, I didn't mean to interrupt, I just wanted to state for the record we received these reports rather late. It was

8 something we were going to address or at least hoping to

9 address. I didn't have it in the initial trial breach but I

10 actually quite frankly didn't think he was qualified as an

11 expert at all.

* * *

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* * *

8 MR. ALTSCHULER: It was specifically to the Brach

9 Eichler firm, Mr. Hammer said we didn't have any downturn

10 even if there was an economic downtown. I just point out

11 that this expert has been in this field for six months.

12 THE COURT: Who are you talking about?

13 MR. ALTSCHULER: Ms. Master. She was an attorney

14 until June 1998 and had no other employment experience

15 whatsoever. And I think the relevant time period was 1993,

16 1994. And she is making some expert judgments about things

17 that may have changed in the ensuing years.

18 My expert has been in the field for many years.

19 I would object on those grounds. I would also object on the

20 grounds that anything other than what was in the pretrial

21 order should be beyond the scope. But mostly going to the

22 qualification of this person to make any declarations about

23 1993, 1994 job market. * * *

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12 THE COURT: I am going to do this a little bit

13 more clinically. Ms. Master's statement or report on page 2

14 deals with Mr. McNamara and I've already commented on that.

15 And then it goes on to describe what she thinks is routine

16 practice within law firms and I do not see any sufficient

17 basis in her experience or knowledge to qualify her to make

18 sweeping statements in that connection. Or even the

19 statement that there is no general rule for the extent to

20 which reference checks are conducted. That pretty well

21 disposes of page 2.

22 On page 1, there are really two statements.

23 First, her agreement that plaintiff's credentials are

24 impressive. I give no weight to that. I think it is silly

25 to call her for that. And I doubt that she is a qualified

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1 judge more than any layperson might be. As to her opinion

2 as to whether he would be a marketable candidate and to what

3 degree and what salary he probably would have been hired at,

4 I just don't see any basis for her making those statements.

5 So I don't see much point in calling her. At

6 least not for that statements purpose because I doubt that

7 it is admissible under 403. That is not to say that there

8 may not be people with knowledge of the market in New Jersey

9 at the time who are competent to say something about it.

10 But I just haven't seen it in the reports tendered. There

11 may be enough evidence elsewhere in the case so you can make

the argument any way but I leave that to you.

MR. BROWN: My only comment would be as of the market in 1993, that was her year, she was interviewing at the time so that's how she was able to tell me what the market was like.

THE COURT: What I can recall on is the statement before me and for that I've indicated the ruling. I've done the same thing for the plaintiff. * * *

(2)

JUN 0 2 2000

No. 99-1802

IN THE

Supreme Court of the United States

HOWARD ALTSCHULER,

Petitioner,

v.

UNIVERSITY OF PENNSYLVANIA SCHOOL OF LAW, *et al.*, BRACH, EICHLER, ROSENBERG, SILVER, BERNSTEIN, HAMMER & GLADSTONE, P.C., JANE DOES, in their capacities as employees and/or agents of Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C., and individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BRACH, EICHLER, *et al.*

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QUESTION PRESENTED

Whether the District Judge properly excluded the proffered expert testimony by petitioner's expert in the science of law firm hiring practices, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent, Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C., is a professional corporation engaged in the practice of law.

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STATEMENT OF THE CASE

After graduating from law school in May, 1993, the petitioner sent a resume to the law firm of Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. Thereafter, the petitioner was not offered a position with the firm.

The petitioner claims that one of the partners of the firm, Burton Eichler, defamed the petitioner by telling another partner, William Brach, that the petitioner was involved in a disciplinary incident at law school. The petitioner claimed that Mr. Eichler received this information from a faculty member or professor at the University of Pennsylvania.

Mr. Eichler denied ever speaking with anyone at the University of Pennsylvania and every professor and administrator at the University of Pennsylvania who was questioned also denied ever speaking to the Brach, Eichler law firm about the petitioner. Mr. Eichler testified that the information that he obtained about the petitioner came not from the University of Pennsylvania, but from a law school classmate of the petitioner who was an associate with a Connecticut law firm.

William Brach testified at trial that he was not told by his partner, Mr. Eichler, that the petitioner was involved in a disciplinary incident while in law school. Mr. Brach was told that Mr. Eichler had a conversation with an associate with a law firm in Connecticut who advised Mr. Eichler that the petitioner was involved in a "controversy" while in law school. Mr. Brach viewed the receipt of this information from Mr. Eichler as part of the natural exchange of information by partners in a law firm.

The information that Mr. Eichler provided about the "controversy" did not affect the decision whether to hire the petitioner because Brach, Eichler never hired anyone for the position. The position in the Land Use Department for which the petitioner interviewed was never filled by the Brach, Eichler law firm. The firm ultimately made a decision not to replace the departed attorney. Indeed, to the time of trial, the position had never been filled. The undisputed trial testimony demonstrated that the law firm's Executive Committee denied approval for the Land Use Department to hire another attorney based on an analysis of the economic profitability of the department.

The petitioner contends that it was actionable for Mr. Eichler to repeat the negative information he received about the petitioner to his partners without conducting an investigation to verify the information. The petitioner relied on the report of a purported expert in 'law firm hiring practices' to support this claim. The trial judge did not permit plaintiff to present expert testimony on the 'science' of law firm hiring practices.

The petitioner complains that the district court barred the expert testimony during the final pretrial conference held on February 19, 1999, only three days prior to trial. Petitioner conveniently fails to point out that the expert report is dated February 16, 1999, *i.e.*, only six days prior to the scheduled trial date. The Trial Court could not have provided the petitioner with more timely notice of the decision to exclude the expert testimony, because the petitioner failed to timely provide the proffered expert report.

It is on this factual record that the District Court determined that the petitioner failed to provide clear and convincing proof of abuse of the conditional privilege.

SUMMARY OF ARGUMENT

The District Judge appropriately exercised his "gatekeeper" function to screen proposed expert testimony for both reliability and relevance, and properly excluded the testimony of petitioner's expert on hiring practices.

REASONS FOR DENYING THE WRIT

A. The District Judge Did Not Abuse His Discretion in Excluding Petitioner's Expert Report Pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Petitioner concedes that the alleged defamatory statements made by Burton Eichler where conditionally privileged. The petitioner had a burden to prove by clear and convincing evidence that there was an abuse of the conditional privilege because the statement was made with actual malice and/or there was excessive publication. The District Judge correctly concluded that there was no evidence, and certainly no clear and convincing evidence, upon which a rational fact finder could conclude that there was actual malice or excessive publication.

The District Judge held that New Jersey law applied to the defamation claim against Brach, Eichler. New Jersey law recognizes that a defamatory statement is not actionable where the statement is subject to a conditional privilege as defined by the New Jersey Supreme Court in *Coleman v. Newark Morning Ledger, Co.*, 29 N.J. 357, 375 (1959):

> . . . [a] communication "made *bonafide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a

> duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable."

Coleman v. Newark Morning Ledger, Co., *quoting*, *Lawless v. Muller*, 99 N.J.L. 9 (Sup. Ct. 1923). The key to the existence of the conditional privilege is the circumstantial justification to the publication of the allegedly defamatory information. *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 36 (App. Div. 1987). In *Bainhauer*, *supra*, the Court cited with approval the *Restatement, Torts Second*, recognizing a conditional privilege where the publisher is, respectively, protecting his own interests, the interests of the recipient or other third person, or an interest common to the publisher and the recipient. *See* 215 N.J. Super. at 36. The "common interest" conditional privilege is defined:

> An occasion makes a publication conditionally privileged if the circumstances leave one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.

Restatement, Torts Second, § 596.

As an example of the common interest conditional privilege, the comments to the *Restatement* set forth that a partner is entitled to be told not only of the discharge of an employee by his fellow partner, but also of the reasons for his discharge, and the fellow partner is conditionally privileged to state the reason even though it reflects upon the conduct or character of the employee in question. This is

true even when the employment is at will, and therefore, the partner to whom the information is communicated is not at risk of liability for breach of an employment contract. *Restatement, Torts Second*, § 596, Comment c. Moreover, the *Restatement* recognizes that a personnel manager is privileged to make a defamatory statement about a former employee to a prospective employer as long as the statement directly relates to the employee's qualifications for the job. *Restatement, Torts Second*, § 595, Comment i.

The immunity of the conditional privilege may be lost if the privilege is "abused." The threshold issue of whether a defamatory statement is conditionally privileged is a question of law to be determined by the Court. *Bainhauer v. Manoukian*, 215 N.J. Super. at 40.

There are four circumstances under which the conditional privilege may be abused:

1. If the statements are made with either actual knowledge of falsity or reckless disregard of falsity;

2. The statement is not made for the purpose of protecting the interest which the privilege is designed to protect;

3. Excessive publication of the statement; and

4. The speaker does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given.

Bainhauer v. Manoukian, 215 N.J. Super. at 42-43. The petitioner was required to prove by clear and convincing

evidence, and not a mere preponderance of the evidence, that the Defendant abused the conditional privilege. *Erickson v. Marsh & McLennan*, 117 N.J. 539, 565-566 (1990).

Clear and convincing evidence is that which produces "a firm belief or conviction as to the truth of the allegations sought to be established." *Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 162 (App. Div. 1990). To meet the clear and convincing standard, the evidence must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy of the truth of the precise facts in issue." *Id. quoting*, *Tapler v. Frey*, 184 Pa. Super. 239, 132 A.2d 890, 893 (Super. Ct. 1957).

Reckless disregard as to the truth or falsity of a statement exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of a statement. *Sisler v. Gannett, Co.*, 222 N.J. Super. 153, 162 (App. Div. 1987), *certif. den.*, 110 N.J. 304 (1988). Excessive publication occurs when the Defendant could have no reasonable belief that the publication was an appropriate means of communicating the defamatory matter to another to whom the publication is privileged. *Feggans v. Billington*, 291 N.J. Super. 382, 399 (App. Div. 1996).

Petitioner impliedly concedes that there was absolutely no evidential basis in the trial record from which a rational fact finder could conclude that Burton Eichler had a motive to make statements concerning the petitioner which Mr. Eichler either knew to be false, or recklessly disregarded the truth. There was no evidence at trial to substantiate any motivation on the part of Mr. Eichler to deliberately or recklessly repeat disparaging comments about the petitioner.

Nor was the publication of the information to the two partners of the Land Use Department who considered hiring the petitioner for that department excessive publication. The District Judge correctly concluded petitioner did not provide clear and convincing evidence of abuse of the conditional privilege.

Given the above, the District Judge did not abuse his discretion in excluding petitioner's expert report pursuant to *Daubert*. As noted above, petitioner complains that three days prior to trial that the Trial Court precluded the petitioner's expert from testifying at trial. The petitioner fails to advise this Court that the expert report is dated February 16, 1999, *i.e.*, only six days prior to the scheduled trial date. The Trial Court could not have provided the petitioner with more timely notice of the decision to exclude the expert testimony, because the petitioner failed to timely provide the proffered expert report.

Nor did the District Judge err in his reliance on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*, as authority for exclusion of the proffered expert testimony. While the particular expert testimony challenged in *Daubert* did involve scientific knowledge, the Supreme Court has made clear that the principles of *Daubert* are not limited to scientific expert testimony, but instead apply to any expert testimony based upon "technical" or "other specialized knowledge." *Fed. Rule Evid.* 702; *Kuhmo Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

Pursuant to *Daubert*, *supra*, trial judges are obligated to screen proposed expert testimony to ensure that it is not only relevant but also reliable. Proposed expert testimony must be supported by appropriate validation, *i.e.*, "good grounds"

based on what is known. Thus the Trial Judge is required to determine that the proposed expert testimony possesses evidentiary reliability. *Daubert* at 590. The District Courts enjoy broad latitude in determining the evidentiary reliability of proposed expert testimony; the District Court's determination of reliability is reviewable on appeal under the abuse of discretion standard. *Kuhmo Tire Company, Ltd.*, *supra*, 119 S. Ct. at 1171.

In this case, the District Court appropriately exercised its discretion in determining that the proposed expert testimony of petitioner's expert lacked the reliability required for admission. Petitioner's expert characterized the hiring process utilized by the Brach, Eichler law firm as "grossly negligent" and "inappropriate and reckless." However, the cause of action for which petitioner sought damages from the Brach, Eichler firm was defamation. The petitioner's expert's proffered testimony was not probative of the central issue, *i.e.*, whether there was an abuse of the conditional privilege by either actual malice or excessive publication; the proffered testimony attempted to create a cause of action for 'law firm hiring practices malpractice.' Moreover, beyond plaintiff's expert's personal opinion and experience, which did not ever include employment by a law firm, there was nothing in the expert report to substantiate the existence of "good grounds" or validation for his opinions, necessary to determine that expert testimony is reliable.

In summary, petitioner's expert's proposed testimony lacked both the reliability and relevance required for the District Judge to conclude that the expert testimony was admissible. The District Judge properly exercised his function in screening the proposed testimony and determining that it was inadmissible.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court deny the writ.

Respectfully submitted,

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